IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1650

MR. STEAK, INC.
JAMES A. MATHER, DONALD J. FOLTZ,
JAMES C. SHEARON, LOUIS J. LEVINSON,
Petitioners,

v.

HARRY L. HELLERSTEIN,
Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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May, 1976

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Mr. Steak, Inc. ("Mr. Steak"), James A. Mather, Donald J. Foltz, James C. Shearon, and Louis J. Levinson, hereby petition this Court to issue a Writ of Certiorari to review the judgment and the opinion of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on February 20, 1976.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is not yet reported; a copy of the opinion is printed in the Appendix hereto at page A-3. The Order of the United States District Court for the District of Colorado, not reported for publication, also appears in the Appendix hereto at page A-1.

JURISDICTION

The date of the judgment sought to be reviewed and the date of its entry is February 20, 1976. This Court's jurisdiction is invoked under Section 1254(1) of Title 28 of the United States Code.

QUESTION PRESENTED

Whether the District Court's Order certifying this action as a class action is appealable under Section 1291 of Title 28 of the United States Code prior to a trial on the merits.

STATUTE AND RULE INVOLVED

The statute involved is Section 1291 of Title 28 of the United States Code.

The rule involved is Rule 23 of the Federal Rules of Civil Procedure.

Each of the above is set out verbatim in the Appendix hereto at page A-10.

STATEMENT OF THE CASE

In April, 1969, Mr. Steak registered its securities for a public offering in accordance with the Securities Act of 1933, as amended, and the rules and regulations of the Securities and Exchange Commission. In connection with that offering, 300,000 shares of Mr. Steak's common stock were sold publicly through Eastman Dillon, Union Securities and Co. (a registered broker-dealer in securities), at a price of $15 per share for an aggregate of $4,500,000. The securities were sold throughout the United States after qualification under various state securities laws.

A complaint was filed by Herbert A. Adise in the United States District Court for the Southern District of New York in February, 1970, under certain provisions of

the securities laws alleging that the Prospectus published by Mr. Steak omitted to state material facts and that various misstatements existed upon which he relied. The case, upon motion of Mr. Steak, was moved to the United States District Court for the District of Colorado.

Thereafter, Adise filed a motion to maintain the action as a class action in accordance with Rule 23, Fed. R. Civ. P. After briefs and oral argument, the District Court denied the motion for class action status. Thereafter, Adise and his counsel lost interest in the case (and it is submitted that this occurred because the class action motion was denied) and a voluntary motion to dismiss with prejudice was made by Adise and granted. *Adise v. Mather,* 56 F.R.D. 492 (D. Colo. 1972).

Subsequently, Harry L. Hellerstein filed a complaint in the United States District Court for the District of Colorado. Counsel for Hellerstein was also counsel for Adise and the identical relief was sought. Further, Hellerstein brought this action against the same parties (including a new defendant—Haskins & Sells, Certified Public Accountants—dismissed from the case) with the notable exception of Eastman Dillon, Union Securities and Co., who was not a named defendant.

The District Court granted Hellerstein's motion to maintain this action as a class action. On February 20, 1976, the Tenth Circuit dismissed the Appeal. It is from this dismissal by the Tenth Circuit that Certiorari is sought.

REASONS FOR GRANTING THE WRIT

This case presents for review the question of whether the Tenth Circuit acted properly in dismissing an appeal from the District Court's Order certifying this suit as a class action. The decision of the District Court raises important questions regarding manageability and adequacy of representation in class actions pursuant to Rule 23, Fed.

R. Civ. P. Moreover, in dismissing the appeal, the Tenth Circuit decided an important Federal question with but a cursory review of prior decisions of this Court. We respectfully submit that the Tenth Circuit's failure to consider the tests outlined by this Court in its earlier decisions, creates a direct conflict between the Tenth Circuit and this Court, which this Court should resolve.

Further, in contra-distinction to the Tenth Circuit, the Second Circuit has attempted to follow the guidelines of this Court with respect generally to the question of appealability of interlocutory orders and has attempted to devise a test peculiarly appropriate to the special question of appealability from lower court orders regarding the maintenance of actions as class actions. The Tenth Circuit failed to even examine the factors suggested by the Second Circuit and the decisions of the Tenth Circuit are in direct conflict with decisions of the Second Circuit and this Court. Because of the great significance of this Federal question and the immediate and irreparable harm caused to Petitioner and others similarly situated, this Court should grant this Petition for Certiorari.

I. PRIOR DECISIONS OF THIS COURT ARE UNDERMINED BY THE TENTH CIRCUIT'S DISMISSAL.

In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) this Court established what is referred to as the "collateral order" exception to the "finality" rule of §1291. *Cohen* involved the question of whether a plaintiff was required to post security for costs prior to the trial of a stockholder's derivative action. *Cohen* could have been adjudicated and the security issue raised on an appeal after the trial. However, this Court held that the Third Circuit properly considered the immediate appeal. The Court further noted its long history of giving "this provision of the

statute this practical rather than a technical construction." 337 U.S. at 546.

Shortly thereafter, in *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507 (1950), this Court stated that there were competing considerations underlying all questions of finality, *viz.*, "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 338 U.S. at 511.

Similarly, in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) this Court stated that whether a ruling is "final" within the meaning of Section 1291 often presents close questions which could be categorized into a "twilight zone" of finality. 379 U.S. at 152. This Court citing *Cohen* noted that because of this difficulty, the requirement of finality is to be a given a "practical rather than a technical construction." Further, this Court reaffirmed the *Dickinson* holding that courts evaluate the competing considerations of piecemeal review and the danger of denying justice. 379 U.S. at 152-153.

More recently, this Court considered the questions of finality in a class action context in the celebrated and protracted *Eisen* litigation. *Eisen v. Carlisle & Jacquelin* ("*Eisen IV*"), 417 U.S. 156 (1974). In *Eisen IV* this Court reviewed with approval its prior decisional law on the question of finality, but ruled narrowly that the case was controlled by the "collateral order" rule first espoused in *Cohen*. 417 U.S. at 156.

In its review of *Cohen* and *Eisen IV* in this matter, the Tenth Circuit seemed to conclude that both decisions should be limited to their particular fact situations. The Tenth Circuit noted that the issue before this Court in *Cohen* involved posting of security for costs and did not relate to any class action matter. The Tenth Circuit read *Eisen IV* to mean that orders granting class action status are review-

able only if such orders include a requirement that defendants pay 90% of the costs of notice to the potential class members.

This narrow interpretation of this Court's decisions fails to consider the aforecited mandated balancing factors of *Dickinson* and *Gillespie*. Nor does the Tenth Circuit consider the mandate of *Cohen*. Rather, the Tenth Circuit held that a trial court order which "merely" grants class certification is not a final decision under Section 1291. The Tenth Circuit does not explain what it meant by "merely", but instead distinguished *Cohen* and *Eisen IV* as involving different fact situations.

The case merits review as the requisite standards of Rule 23, Fed. R Civ. P. are not met. Rule 23(a) requires that the representative party be able to thoroughly and adequately protect the interests of the class and that his claims or defenses be typical of the claims or defenses of the class. Further, Rule 23(b)(3)(D) mandates consideration of the difficulties likely to be encountered in the management of a class action. The class representative in this action is unsatisfactory. Hellerstein cannot fairly and adequately protect the interests of the class and his claims are not typical of the claims of the class because of, among other things, his failure to join prime defendants, his lack of concern for the present corporate defendant and its shareholders and employees and his dereliction of duty which has raised the questions of laches and estoppel. Moreover, this huge class action is unmanageable. For these reasons, the District Court Judge, after considering extensive memoranda, the fruits of discovery, and oral argument, held that his Order granting class action status should receive interlocutory review.

The Tenth Circuit in dismissing the Appeal declined to consider the merits of the Appeal.

II. THE COURTS OF APPEALS ARE IN SERIOUS CONFLICT REGARDING THE APPEALABILITY UNDER SECTION 1291 OF ORDERS CERTIFYING CLASS ACTIONS.

Since the 1966 amendments to Rule 23, Fed. R. Civ. P., there has been both a proliferation of class actions and numerous appeals from trial court orders regarding the maintenance of actions as class actions. The Second Circuit confronted the problem in *Eisen I* where a motion for class action certification was denied. *Eisen v Carlisle & Jacquelin* 370 F. 2d 119 (2d Cir. 1966). cert. denied, 386 U.S. 1035 (1967). The individual plaintiff's claim was only $70 and thus, the dismissal of the class action certification would be the "death knell" of the action.

Several years later in the same action, the Second Circuit determined that the later order of the Trial Court allowing the action to be maintained as a class action was also appealable immediately. *Eisen v Carlisle & Jacquelin* (*Eisen III*), 479 F.2d 1005 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). The Second Circuit held that in the interests of equality of treatment, the defendant should be allowed to appeal an order permitting the representative of the plaintiff to continue the suit as a class action. Subsequent to *Eisen III,* the Second Circuit devised an analytical framework to determine when immediate appealability would be proper. This consists essentially of a determination whether the class action order: (1) is fundamental to the further conduct of the case; (2) will cause irreparable harm to a defendant in terms of time and money spent in a huge class action; and (3) can be reviewed without delving into the merits of the case. See, *Herbst v. ITT,* 495 F.2d 1308 (2d Cir. 1974); *Kohn v. Royal, Koegel & Wells,* 496 F.2d 1094 (2d Cir. 1974). In fashioning this tripartite test, the Second Circuit followed the broad mandates of this Court in *Cohen, Dickinson* and *Gillespie*.

Had the Tenth Circuit followed the mandates of the Supreme Court in its earlier decisions in the same manner that the Second Circuit did in *Eisen III* and *Herbst,* the appeal would not have been dismissed. In this action, the plaintiff purchased only 25 shares of Mr. Steak stock (at a price of $15 per share or an aggregate of $375, all of which he has sold) and it is hardly conceivable that he would continue this action individually. Therefore, the class action determination is fundamental to the further conduct of the case.

Further, the Order granting class action status will cause irreparable harm to Mr. Steak. As this Court noted in *Blue Chip Stamps v Manor Drug Stores,* 421 U.S. 723 (1975), the danger of vexatious litigation is particularly great in actions brought for violations of Federal securities laws. Further, class actions in this area generally present complex questions and involve large numbers of exhibits and witnesses. See *Norman v McKee,* 431 F.2d 769,774 (9th Cir. 1970). The instant case is no exception. The trial will be lengthy and costly and will cause much hardship to a relatively small corporation like Mr. Steak. It should be recognized that to a small corporation like Mr. Steak, a class of several thousand is far more onerous than a class of several million to a corporate behemoth like ITT. Moreover, review of the contentions raised by Mr. Steak relating to managability and the adequacy of class representation will not require an inquiry into the merits as these are collateral issues. We submit, that in this situation, the cost of "piecemeal review" is far outweighed by the danger of "denying justice" to Mr. Steak.

Nonetheless, other circuits, like the Tenth Circuit, have held class certification orders non-appealable. *Thill Securities Corp. v. New York Stock Exchange,* 469 F.2d 14 (7th Cir. 1972); *Walsh v City of Detroit,* 412 F.2d 226 (6th Cir. 1969); *Blackie v Barrack,* 524 F.2d 891 (9th Cir.

1975), cert. filed March 5, 1976 (Dkt. No. 75-1258). These circuits would not permit an interlocutory appeal from a class certification order under any set of factual circumstances. It appears as if the Tenth Circuit will allow an appeal only when the precise factual situation of *Eisen* is raised. See opinion, Appendix at pages A-7, 8. The Second Circuit permits appeals if its three-pronged test is met. *Herbst v. I.T.T., supra; Kohn v. Royal, Koegel & Wells, supra.* Hence, there exists a serious conflict among the Courts of Appeals. We submit that, particularly because of the important Federal question involved, this Court should resolve the conflict among the circuits and reaffirm its earlier decisions in a manner which will provide no doubt as to the propriety of reviewing class certification orders where it is practicable and equitable to do so.

III. THE APPEALABILITY OF CLASS CERTIFICATION ORDERS PRESENTS AN IMPORTANT QUESTION ABOUT FEDERAL LAW WHICH THIS COURT SHOULD DECIDE IMMEDIATELY.

As stated herein, the Circuit Courts are in conflict regarding the propriety of allowing an appeal from an interlocutory order certifying that an action may be maintained as a class action. The conflict merits special and immediate attention by this Court because of the importance of the federal question involved and the far reaching consequences of such an order to Mr. Steak and other parties similarily situated.

In *Eisen III,* Judge Medina noted that within the past few years "class actions have sprouted and multiplied like the leaves of the green bay tree." *Eisen v Carlisle & Jacquelin (Eisen III),* 479 F.2d 1005, 1018 (2d Cir. 1973), vacated, 417 U.S. 156 (1974). Judge Medina recognized that one by-product of the proliferation of class actions was a terrific pressure on defendants to settle these actions irre-

spective of the merits of the plaintiffs' claims. 479 F.2d at 1019. This Court has recognized that this danger is particularly great in securities cases. *Blue Chip Stamps v Manor Drug Stores,* 421 U.S. 723 (1975). Other than its decision in *Eisen IV,* this Court has not yet confronted the question of the immediate appealability of class certification orders.

This Court should take cognizance of the fact that the majority of the Circuit Courts of Appeals will not presently allow an immediate appeal of class certification orders under any circumstances. If this trend continues unabated, it will mean the end of the death knell doctrine as it applies to class certification. We submit that this was not what was meant in *Eisen IV* and that this Court should reaffirm its earlier decisions in *Cohen, Dickinson* and *Gillespie* and provide guidance to the courts of appeals for determining under what circumstances immediate appeal is proper.

CONCLUSION

For the reasons set forth above, Petitioner respectfully prays that this Court grant a Writ of Certiorari to review the Judgement of the United States Court of Appeals for the Tenth Circuit.

Dated: May 7, 1976

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

HARRY L. HELLERSTEIN,
Plaintiff,

vs.

JAMES A. MATHER, et al.,
Defendants.

Civil Action
No. C-4738
ORDER

This action is brought to recover damages pursuant to § 11 of the 1933 Securities Act (15 U.S.C. § 77k). Plaintiff alleges that Mr. Steak, Inc., failed to state material facts and misrepresented other material facts in a registration statement and prospectus dated April 22, 1969. Specifically, it is claimed that Mr. Steak, Inc., failed to disclose certain contingent liabilities relating to franchise refunds and, instead, included these liabilities as income.

On April 22, 1969, plaintiff purchased twenty-five shares of the common stock of Mr. Steak, Inc. He moved to maintain the action as a class action to represent a class consisting of those persons who purchased Mr. Steak, Inc., stock either at the initial public offering or in the after market between April 22, 1969, and August 31, 1969. Said class is restricted to those who purchased the specific shares offered to the public on April 22, 1969.

Briefs in support of and in opposition to the motion were filed.

At oral hearing on plaintiff's motion for a class action determination, the Court ordered the matter continued so as to allow the presentation of further evidence concerning the total number of persons included in the class, identification of class members and the manageability of this suit as a class action. Both parties have submitted such evidence in the form of memoranda and affidavits.

After a consideration of the briefs and the evidence submitted and after hearing oral arguments, the Court finds:

1. That in order to recover, it is not necessary that the plaintiff and the members of the class prove that reliance upon the registration statement was the proximate cause of the damages claimed.
2. That all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure have been met, and in addition, that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

IT IS THEREFORE ORDERED that the plaintiff's motion to maintain this action as a class action is hereby granted.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of this litigation.

IT IS FURTHER ORDERED that further proceedings in this action shall be stayed for a period of ten days from this date to permit an appeal to be taken from this order. If an appeal is taken, there shall be a further stay of proceedings in this action pending the disposition of that appeal. Should no appeal be taken within ten days after the entry of this order, this stay of proceedings shall terminate.

Entered this 24th day of December, 1974.

BY THE COURT:

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 75-1087

HARRY L. HELLERSTEIN,
Plaintiff-Appellee,

v.

MR. STEAK, INC.,
Defendant-Appellant,

JAMES A. MATHER, DONALD J. FOLTZ, JAMES C. SHEARON, LOUIS J. LEVINSON,
Defendants.

Appeal from the United States District Court for the District of Colorado. (D. C. No. C-4738)

Daniel W. Krasner (Brenman, Sobol & Baum and Pomerantz Levy Haudek & Block, on the brief), for Plaintiff-Appellee.

Sanford B. Hertz (Robert W. Hite, on the brief), for Defendant-Appellant.

Before LEWIS, *Chief Judge,* and SETH and MCWILLIAMS, *Circuit Judges.*

MCWILLIAMS, *Circuit Judge.*

This is an appeal from an order of the trial court granting class action status to an action brought by one Hellerstein against Mr. Steak, Inc., and certain of its directors and officers, for an alleged prospectus fraud in violation of § 11 of the Securities Act of 1933 and in further violation of the rules and regulations of the Securities and

Exchange Commission promulgated thereunder. 15 U.S.C. § 77(k). In his complaint Hellerstein alleges that he brought the action on his own behalf and representatively on behalf of all persons who purchased common stock of Mr. Steak pursuant to a public offering on April 22, 1969, or thereafter between April 22, 1969, and August 31, 1969. As far as Hellerstein himself is concerned, it is apparently agreed that he purchased 25 shares of common stock of Mr. Steak, Inc., for $375, and that he later sold this stock for $50 and thereby sustained a loss of $325.

On December 24, 1974, the trial court signed a formal order granting Hellerstein's request that the action proceed as a class action. On that same date the trial court also entered a further order permitting an immediate appeal under 28 U.S.C. § 1292(b).

On January 3, 1975, counsel for Mr. Steak and the other defendants filed a notice of appeal. However, no petition for permission to appeal was filed with the clerk of this court within ten days as required by 28 U.S.C. § 1292(b), and Rule 5 of the Federal Rules of Appellate Procedure. In fact no such petition was ever filed in this court. However, on March 14, 1975, Mr. Steak did file in this court a motion for an enlargement of time within which to file a Rule 5(a) petition. This motion was denied by a panel of this court by minute order entered March 25, 1975.

The trial court's order that the present proceeding go forward as a class action is not now subject to review under 28 U.S.C. § 1292(b). Where an interlocutory order of a trial court is certified by the trial court for immediate appeal under 28 U.S.C. § 1292(b), but thereafter no petition to appeal from such interlocutory order is presented to the circuit court within the ten-day period proscribed by 28 U.S.C. § 1292(b) and Rule 5, a court of appeals is without jurisdiction to hear the appeal. That Mr. Steak

and other defendants filed a notice of the appeal in the trial court within ten days of the order granting class action status does not constitute compliance with the requirements of 28 U.S.C. § 1292 and Rule 5. Alabama Labor Counsel Public Employees Local 1279 v. Alabama, 453 F.2d 922 (5th Cir. 1972); Wagner v. Burlington Industries, Inc., 423 F.2d 1319 (6th Cir. 1970); and Milbert v. Bison Laboratories, Inc., 260 F.2d 431 (3d Cir. 1958). Accordingly, we are without jurisdiction under 28 U.S.C. § 1292(b) to review the propriety of the trial court's order granting class action status.

The main issue is whether the order of the trial court granting class action status may be reviewed by us on its merits under 28 U.S.C. § 1291. Resolution of that issue is in turn dependent on a determination as to whether the order of the trial court simply granting class action status is a "final decision" within the meaning of 28 U.S.C. § 1291. We conclude that the order in the instant case is not such a final decision as is contemplated by 28 U.S.C. § 1291, and we therefore dismiss the appeal.

Much has been written on the general subject of the appealability of an order of a trial court granting or denying class action status. We do not propose here to make any major contribution to that vast reservoir of judicial writing. We would simply hold that an order of a trial court which merely grants a request that an action proceed as a class action under Fed.R.Civ.P. 23 is not a final decision under 28 U.S.C. § 1291 and hence notice of appeal will not lie to such order. In support of our holding, see such cases as Blackie v. Barrack, 524 F.2d 891 (9th Cir. 1975); In re Cessna Aircraft Distrib. Antitrust Litigation, 518 F.2d 213 (8th Cir. 1975), *cert. denied,* U.S. (1975); Rodgers v. United States Steel Corp., 508 F.2d 152 (3d Cir. 1975), *cert. denied,* U.S. (1975); and Walsh v. City of Detroit, 412 F.2d 226 (6th Cir. 1969).

We do not believe our holding to be in any way at odds with either Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) or Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974). In *Beneficial Loan* the Supreme Court held that a final decision under 28 U.S.C. § 1291 was not limtied to "those final judgments which terminate an action." In *Beneficial Loan* a stockholder's derivative action was brought against the corporation. Federal jurisdiction was based on diversity. The trial court held that a state statute which required the plaintiff to give security prior to trial for the expenses reasonably anticipated by the defendant in defense of the action was inapplicable in a federal proceeding. On appeal the Third Circuit reversed and held the state statute to be applicable to the plaintiff. *See* Beneficial Industrial Loan Corp. v. Smith, 170 F.2d 44 (3d Cir. 1948). On certiorari the Supreme Court affirmed, and on the appealability issue held that the order sought to be appealed from "appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546.

So, in *Beneficial Loan,* an order relating to whether the plaintiff had to give security for defendant's anticipated expense in defending an action *prior* to the action going forward was held to be a final decision on that particular matter within the meaning of 28 U.S.C. § 1291. Needless to say, the background facts of *Beneficial Loan* bear little resemblance to those in the instant case. The issue before the Court in *Beneficial Loan* did not relate to any class action matter. Additionally, *Beneficial Loan* was decided at a time when there was no interlocutory appeal as is now provided by 28 U.S.C. § 1292(b), and such suggests that *Beneficial Loan* should be reserved for the exceptional case.

Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) did involve a class action proceeding. There the trial court, under perhaps gentle prodding from the circuit court, reversed its earlier order and ordered that an antitrust and securities law action proceed as a class action. In connection therewith, the trial court also entered the further order that inasmuch as two and one-quarter million members of the prospective class could be identified by name and address and since it would cost $225,000 to send individual notice to all of them, that individual notice would only be sent to a limited number of the prospective class, and that as to the remainder of the class there would only be notice by publication. Furthermore, after a preliminary hearing, the trial court determined that the plaintiffs were "more than likely" to prevail at trial, and for that reason ordered that the defendants pay 90% of the cost of the notification scheme.

Eisen was before the Second Circuit on three occasions, and that court held in so-called *Eisen I* that the trial court's initial determination that the action should not proceed as a class action was a final decision under 28 U.S.C. § 1291. Eisen v. Carlisle & Jacquelin, 370 F.2d 119 (2d Cir. 1966). In *Eisen III,* the Second Circuit held, in effect, that the later order of the trial court granting class action status and the further order concerning notice and requiring prepayment of 90% of the notification expense by the defendant was also a final decision under 28 U.S.C. § 1291. Eisen v. Carlisle & Jacquelin, 479 F.2d 1005 (2d Cir. 1973).

On certiorari, the Supreme Court, on the appealability issue, held that the Second Circuit in *Eisen III* had jurisdiction under 28 U.S.C. § 1291 "to review fully the District Court's resolution of the class action notice problems in this case." It would appear to us that in thus holding the Supreme Court was not so much concerned with the mere order that the case proceed as a class action as it was with

that part of the order relating to notice, and even more particularly with that part of the notice order that saddled the defendant with 90% of the notification expense. In the instant case we are concerned with an order which only grants class action status, and the order sought to be reviewed makes no reference to notice.

Counsel for Mr. Steak relies on several cases emanating from the Second Circuit which hold that under certain circumstances an order of a trial court granting or denying class action status is a final decision under 28 U.S.C. § 1291.[1] It is true that the Second Circuit, at least in the past, has been a bit more inclined than other circuits to hold that an order granting or denying class action status is appealable under 28 U.S.C. § 1291. Whether in the light of certain recent cases as, for example, Parkinson v. April Industries, Inc., 520 F.2d 650, (2d Cir. 1975), such is still the case is perhaps debatable. In *Parkinson* the Second Circuit held that an order of the trial court granting class action status and involving as it does a "discretionary ruling . . . that the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3) have been satisfied . . . is . . . not a 'finite and conclusive determination of judicial power' . . ." and was not reviewable under 28 U.S.C. § 1291. 520 F.2d at 658. In a concurring opinion Judge Friendly would have held that orders merely granting or denying class action status, as distinguished from a class action order of the *Eisen* type involving notice and a requirement that the defendant prepay notification expense, are appealable only under the procedure for review of interlocutory orders as provided in 28 U.S.C. § 1292(b). In any event, whatever

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[1] Eisen v. Carlisle & Jacquelin *(Eisen I)*, 370 F.2d 119 (2d Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967); Eisen v. Carlisle & Jacquelin *(Eisen III)*, 479 F.2d 1005 (2d Cir. 1973), *vacated*, 417 U.S. 156 (1974); Herbst v. ITT, 495 F.2d 1308 (2d Cir. 1974); and Green v. Wolfe Corp., 406 F.2d 291 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969).

may be the rule in the Second Circuit, we are persuaded that our ruling in the instant case is the preferred one.

We further believe that our holding in the instant case is in substantial accord with our prior decisions bearing on this particular matter. In Seiffer v. Topsy's International, Inc., 520 F.2d 795 (10th Cir. 1975), *cert. denied*, U.S. (1976), we recognized that generally appealability under 28 U.S.C. § 1291 is "limited to final judgments after trial on the merits" and in that case we held that appellate review by us, before trial, of an order of the trial court certifying class action status is "jurisdictionally inappropriate."

In Gerstle v. Continental Airlines, Inc., 466 F.2d 1374 (10th Cir. 1972), we held that an order "declassifying" an action was interlocutory and not final and appealable. In thus holding we noted that under Fed.R.Civ.P. 23(c)(1) an order by a trial court relating to class action status may be conditional and may be altered or changed before a decision on its merits. In this regard, *see also* In re King Resources Co. Security Litigation, 525 F.2d 211 (10th Cir. 1975), where an attempted appeal from an order certifying class action status was dismissed as being "premature."

The general rule is that an interlocutory order from which no appeal lies is merged into the final judgment and open to review on appeal from that judgment. For cases where an order of the trial court denying class action status was merged in the final judgment on the merits of the case and subject to review in an appeal from that final judgment, see Monarch Asphalt Sales Co., Inc. v. Wilshire Oil Company of Texas, 511 F.2d 1073 (10th Cir. 1975) and Esplin v. Hirsch, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

Appeal dismissed.

28 U.S.C. § 1291

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Rule 23, Federal Rules of Civil Procedure

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgement; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do

not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar pro-

cedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1650

MR. STEAK, INC.,
JAMES A. MATHER, DONALD J. FOLTZ,
JAMES C. SHEARON, LOUIS J. LEVINSON,

Petitioners,

—v.—

HARRY L. HELLERSTEIN,

Respondent.

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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June 21, 1976

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In this class action on behalf of purchasers of common shares of defendant Mr. Steak, Inc. alleging violations of § 11 of the Securities Act of 1933, the District Court for the District of Colorado (Chilson, J.) granted plaintiff's motion for class suit certification pursuant to FRCP 23(b)(3). Mr. Steak appealed the District Court's interlocutory order, but the Tenth Circuit unanimously dismissed the appeal for lack of appellate jurisdiction (A-3; reported, 531 F. 2d 470 (10th Cir. 1976)). Defendant-petitioners, Mr. Steak and four of its directors, now seek certiorari.*

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* Defendants Mather, Foltz, Shearon and Levinson did not appeal the District Court's order (A-3) but are named as petitioners herein.

Question Presented

Could petitioners appeal as a matter of right from the interlocutory order of the District Court certifying a class action?

Statement of the Case

Plaintiff commenced this action as a class suit on behalf of all purchasers of Mr. Steak common shares between April 22 and August 31, 1969. The shares in question represented an initial public offering of Mr. Steak shares. They were sold to the public pursuant to a registration statement and prospectus which became effective April 22, 1969. Defendants are the issuer and its principal officers, directors and shareholders as of the effective date of the prospectus and registration statement. Plaintiff claims that the prospectus, by omitting highly material facts with respect to Mr. Steak's franchise operations and financial condition, violated § 11 of the Securities Act of 1933, 15 USC § 77k.

Plaintiff moved for class suit determination. Defendants, opposing the motion, asserted that plaintiff would not fairly and adequately protect the interests of the class because he was guilty of laches in not commencing this action sooner and because he failed to join the underwriters of the Mr. Steak public offering as defendants.

After hearing counsel the District Court requested additional affidavits regarding the estimated size of the class and the proposed method of giving notice under FRCP 23(c)(2). Plaintiff estimated that the Rule 23 notice would go to approximately 4,000 to 5,000 persons, 40% to 50% of whom would qualify as class members (R. 132-151).* Plaintiff proposed to give notice to all class members by

* "R" refers to the Record below.

direct mail at his own expense (R. 137). Defendants did not dispute plaintiff's estimate of the size of the class or the method proposed for giving notice.

The District Court granted plaintiff's class action motion (A-1). It found—

> "That all of the requirements of Rule 23(a) of the Federal Rules of Civil Procedure have been met, and in addition, that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of this controversy." (A-2)

The order included an appeal certificate under 28 USC § 1292(b). Mr. Steak, however, did not apply to the Tenth Circuit for permission to appeal pursuant to § 1292(b) and FRAP 5. It chose instead to prosecute its appeal under 28 USC § 1291.

The Court of Appeals, without reaching the merits, dismissed the appeal for lack of appellate jurisdiction. The Court concluded (A-5) that—

> "an order of a trial court which merely grants a request that an action proceed as a class action under Fed. R. Civ. P. 23 is not a final decision under 28 U.S.C. § 1291 and hence notice of appeal will not lie to such an order."

REASONS FOR DENYING THE WRIT

POINT I

The petition presents no question warranting review by this Court.

1. Since the First Judiciary Act of 1789, the rule against piecemeal appeals has been the firm policy of the federal courts; *Cobbledick* v. *United States,* 409 U.S. 323 (1940). The rule, now embodied in 28 USC § 1291, requires a "final decision" for appeal purposes.

Under FRCP 23(c)(1), an order granting or denying class action status "may be altered or amended before the decision on the merits." Consequently, it has been held not to be a "final decision". *Blackie* v. *Barrack,* 524 F. 2d 891, 897 (9th Cir. 1975), cert. petition pending; *In re Cessna Aircraft Distrib. Antitrust Litigation,* 518 F. 2d 213, 215 (8th Cir.), *cert. denied* sub nom. *Cessna Aircraft Co.* v. *White Industries,* U.S. , 96 S. Ct. 369 (1975); *Rodgers* v. *United States Steel Corp.,* 508 F. 2d 152 (3rd Cir.), *cert. denied,* U.S. , 96 S. Ct. 54 (1975); *Walsh* v. *City of Detroit,* 412 F. 2d 226 (6th Cir. 1969); *Thill Securities Corp.* v. *New York Stock Exchange,* 469 F. 2d 14, 17 (7th Cir. 1972); *Seiffer* v. *Topsy's International, Inc.,* 520 F. 2d 795 (10th Cir. 1975), *cert. denied,* U.S. , 96 S. Ct. 779 (1976). See also *Esplin* v. *Hirschi,* 402 F. 2d 94 (10th Cir. 1968), *cert. denied,* 394 U.S. 928 (1969); *Gerstle* v. *Continental Airlines, Inc.,* 466 F. 2d 1376, 1377 (10th Cir. 1972).

In the past eighteen months this Court has thus denied certiorari in at least three cases involving the identical issue raised here: the appealability of an order certifying class action status. The case at bar presents no other or better grounds for review than did *Cessna Aircraft, supra, Rodgers, supra,* and *Seiffer, supra.*

2. Defendants invoke the collateral order doctrine of *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The argument is boiler plate; there—

> "appears to be an irresistible impulse on the part of appellants to invoke the 'collateral order' doctrine whenever the question of appealability arises". *Borden Co.* v. *Sylk,* 410 F. 2d 843, 845-46 (3rd Cir. 1969)

The collateral order doctrine has been thoroughly developed by this Court in three major decisions: *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U.S. 541; *Gillespie* v. *United States Steel Corp.,* 379 U.S. 148 (1964); and *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156 (1974). The rule having thus been settled, its further application depends on an infinite variety of circumstances presented from case to case. Such individual determinations are the task of the Courts of Appeals. If they observe the standards laid down by this Court—as did the Court below—there is no occasion for this Court to further settle an "important question of federal law" or to exercise its "power of supervision" (Rule 19(1)(b) of this Court).

The decision below is not in conflict with any decision of this Court.

Contrary to petitioners' assertion, the decision below is in complete harmony with *Cohen, supra* (337 U.S. 541), and its progeny, including *Eisen, supra* (417 U.S. 156).

In *Cohen,* this Court carved out a limited exception to the finality doctrine: An immediate appeal under § 1291 lies only where a decision "finally" determines claims "separate from and collateral to rights asserted in the action too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated" (337 U.S. at 545-47).

The class order here in question meets none of these criteria.

(a) In the District Court petitioners urged that plaintiff is an inadequate class representative because of his alleged laches and abuse of process (see Pet. 6). These contentions go far into the merits; in fact, petitioners presented them by a motion to dismiss, which the District Court denied, *Hellerstein* v. *Mather,* 360 F. Supp. 473 (D. Colo. 1973). Since the class suit issues thus overlap the merits, the class order is not appealable even if all other conditions of *Cohen* were met. In the language of *Cohen, supra,* the class issues are not "separable from" the rights asserted in the action.

(b) An order granting or denying class action status does not "finally determine" the class suit question, as required by *Cohen.* Under FRCP 23(c)(1), a class suit determination may be altered or amended at any time prior to the entry of final judgment.

(c) Since a class suit order is appealable after the entry of final judgment, *Esplin* v. *Hirschi, supra,* 402 F. 2d 94, the third criterion of *Cohen* is likewise absent here. Review may be delayed, as it is for all interlocutory orders, but it will not be denied at the proper time.

(d) Even where a District Court "finally" determines a collateral right, its decision is appealable under the *Cohen* rule only if "a serious and unsettled question" has been presented (337 U.S. at 547). There is no such question here. A class suit order is "a discretionary decision, the propriety of which will necessarily vary from case to case"; *General Motors Corp.* v. *City of New York,* 501 F. 2d 639, 647 (2nd Cir. 1974). Moreover, these petitioners could have prosecuted their appeal under § 1292(b). Their failure to seize that opportunity should not be rewarded by an *ad hoc* expansion of the *Cohen* doctrine.

Nor is this Court's decision in *Eisen* (417 U.S. 156) authority for petitioners' appeal. Indeed, it points in the opposite direction. The Second Circuit had broadly held that an order granting class action status was appealable; *Eisen* v. *Carlisle & Jacquelin,* 479 F. 2d 1005 (2d Cir. 1973). This Court vacated the broad holding of the Court of Appeals and sustained the appeal only with respect to the District Court's improper allocation of the class notice costs (417 U.S. at 172). In the present case, the District Court's order did not deal with the class notice; *Eisen* is, therefore, inapplicable.

In sum, there exists no conflict between the decision below and any decision of this Court.

The decision below is not in conflict with those of the Second Circuit.

Petitioners contend that the decision below refused to adopt the so-called three-pronged test of appealability developed by certain earlier decisions of the Second Circuit. *Kohn* v. *Royal, Koegel & Wells,* 496 F. 2d 1094, 1098 (2d Cir. 1974); *General Motors Corp.* v. *City of New York, supra,* 501 F. 2d at 504. Under that test, a class suit order would be appealable if the order is "fundamental" to the case, if its review is "separable from the merits", and if the class action is so "huge" that defending it would cause irreparable harm to the defendant. Petitioners completely fail to show that application of this test would support their appeal; plainly it would not since, as previously noted, review of the present class suit order is not "separable from the merits" and the present class is anything but "huge".

What is more, the most recent decision of the Second Circuit on the subject, *Parkinson* v. *April Industries,* 520 F. 2d 650, 658 (2d Cir. 1975), holds that no appeal lies from a—

> "discretionary ruling of the district judge that the prerequisites of Rule 23(a) and the requirements of Rule 23(b)(3) have been satisfied."

The District Court's decision in the case at bar was precisely such a "discretionary ruling". Accordingly, the dismissal of the appeal from that decision is in full agreement with the rule of the Second Circuit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
June 21, 1976.

Respectfully submitted,

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